81-2203

NO. ____

Office - Supreme Court, U.S.
FILED
MAY 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

JAMES M. GIOVANAZI,

PETITIONER,

VS.

RUTH C. GIOVANAZI,
TRAVELERS INSURANCE COMPANY,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES M. GIOVANAZI
IN PROPRIA PERSONA
C/O LORETTA H. HELLEN
3101 FIRST AVENUE
SACRAMENTO, CA 95817
(916)457-5771

May 26, 1982

QUESTIONS PRESENTED

DOES THE EX PARTE ISSUANCE BY THE STATE COURT OF CALIFORNIA OR ORDERS AGAINST PLAINTIFF AND THE POTENTIAL ENFORCEMENT OF SAID ORDERS BY THE FULL COERCIVE POWER OF THE STATE CONSTITUTE "STATE ACTION" WITHIN THE MEANING OF TITLE 42 UNITED STATES CODE SECTION 1983?

IS CLASS BASED INVIDEOUS DISCRIMINATORY ANIMUS REQUIRED AS AN ELEMENT NECESSARY TO STATE A CAUSE OF ACTION PURSUANT TO TITLE 42 UNITED STATES CODE SECTION 1985(2)?

IS PLAINTIFF'S MEMBERSHIP IN EITHER THE CLASS OF MILITARY PERSONS OR THE CLASS OF ADVERSE PARTIES A SUFFICIENT CLASS FOR THE PURPOSES OF STATING A CLAIM PURSUANT TO TITLE 42 UNITED STATES CODE SECTION 1985(2)?

IS PLAINTIFF'S RIGHT TO DUE PROCESS VIOLATED BY THE DISMISSAL OF HIS COMPLAINTS ?

TABLE OF CONTENTS

Questions presented.....1

Opinions Below.....2

Jurisdiction.....2

Constitutional provisions and statues involved.....2a

Statement of the Case 3

Reasons for granting the writ:.....

The decision below conflicts with stare decisi of this Court and with statutory language of Title 42 U.S.C. 1983.....7

The question of whether class based invideous discriminatory animus is required to state a cause of action pursuant to Title 42 U.S.C. 1985(2) remains unaddressed by this Court and courts below find a "dearth" of authority to interpret the Congressional intent.....21

Federal courts of appeals are at variance with each other and lack any objective or basic guidelines to determine whether or not membership in a particular class is legally sufficient to state a

cause of action pursuant to Title 42 U.S.C. 1985(2)..... 23

Plaintiff's right to due process was violated by the dismissal of his complaint(s)..... 28

Conclusion..... 30

TABLE OF AUTHORITIES CITED

Cases

Federal Cases:

Anderson National Bank v. Luckett 321 U.S. 233 (1944)..... 30

Armstrong v. Manso, 380 U.S. 545 (1965).... 10

Azur v. Conley, 456 F2d 1382 (6th Cir., 1972)..... 23

Bivens v. Six Unnamed Agents, 403 U.S. 388 (1971)..... 7,9,11, 15,20

Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U.S. 673 (1930)..... 10

Brawer v. Horowitz, 525 F2d 830 (3rd Cir., 1976)..... 21,23

Camara v. Municipal Court 387 U.S. 523..... 9

Cameron v. Brock, 473 F2d 608 (6th Cir., 1973)..... 23

Civil Rights Cases, 109 U.S. 3 (1883)..... 7

Costello v. United States, 587 F2d 424 (9th Cir., 1978), cert. denied 442 U.S. 929 (1979).... 24

Fleming v. Nestor, 363 U.S. 608..... 25

Grannis v. Ordean, 234 U.S. 385 (1914)..... 10

Green v. Dumke, 480 F.2d 624
(9th Cir., 1973)..... 7

Griffin v. Breckenridge,
403 U.S. 88 (1971)..... 22,23

Hahn v. Sargant, 523 F2d 461
(1st Cir., 1973)..... 21

Joint Anti Facist Committee v.
McGrath, 341 U.S. 123 (1951).. 10

Leeke v. Timmerman ___ U.S. ___,
70 L.Ed.2d 65 (1981)..... 18,19

Means v. Wilson, 522 F2d 833
(8th Cir., 1975)..... 23

P.G.S. Company v. Merrill, Lynch,
Peirce, Fenner & Smith, Inc.,
417 F2d 659 (9th Cir.,
1969)..... 29

Phillips v. International Association
of Bridge and Iron
Workers, 576 F2d 939
(9th Cir., 1977)..... 15,16

Sanders v. Veterans Administration,
450 F2d 955 (9th Cir.,
1974)..... 29

Shelley v. Kramer, 334 U.S. 1 (1948)..... 7,8,9,11
17,18,19
20,22

Snyder v. Massachusetts, 219 U.S. 97..... 9

Sturges v. Crowshield, 17 U.S. (4 Wheat)
122 (1819)..... 9

Sykes v. State of California (Department of Motor Vehicles) 497 F2d 197 (9th Cir., 1974)..... 14,15

Tongol v. Usery, 601 F2d 1091 (9th Cir., 1979)..... 7

United States v. Classic, 313 U.S. 299 (1941)..... 7

United States v. Harris, 106 U.S. 629..... 22

United States v. Tyler, 105 U.S. 243 (1881). 25

Wolf v. People of Colorado, 338 U.S. 25..... 9

Wyman v. James, 400 U.S. 309 (1971)..... 9

California cases:

Brown, in re Marriage of, (1979) 99 C.A. 3d 702..... 13

Fithian, in re Marriage of, 10 C.3d 592 (1974), cert. denied 419 U.S. 829 (1974)..... 25

Gorman v. Gorman, 90 C.A.3d 454 (1979)..... 25

Henn v. Henn, 26 C.3d 323 (1980)..... 25

Milhan, in re Marriage of 27 C.3d 765 (1980)..... 25

Sammull, in re Marriage of 103 C.A. 3d 557..... 13

CONSTITUTION

United States Constitution:

Fourth Amendment.....10

Fourteenth Amendment.....10,21,22

California State Constitution:

Article I, Section 1.....10,12,13

Article I, Section 10.....26

STATUTES

37 U.S.C. 701(a).....25

42 U.S.C. 1983.....7,8,18,19,20

42 U.S.C. 1985(2).....21,22,27,28

California Civil Code Section 5118.....25

California Code of Civil Procedure Section:

527(b).....10

1209(5).....10

2031.....11

2034.....12

OPINIONS BELOW

The opinion of the United States District Court, for the Eastern District of California is unreported; however, it is printed in the Appendix A,pages a1 through a3. The memorandum of the United States Court of Appeals for the Ninth Circuit is unreported; however, it is printed in the Appendix A, pages a3 through a4. The denial by the United States Court of Appeals, for the Ninth Circuit, of Plaintiff's request for rehearing is unreported; howevef,it is printed in the Appendix A, page a5.

JURISDICTION

The order of the United States District Court, for the Eastern District (dismissing Count II and CountIII of Plaintiff's complaint) was entered on September 2, 1980. On February 3, 1982, the United States Court of Appeals, for the Ninth Circuit, affirmed the dismissal. On February 26, 1982, the United States Court of Appeals denied Plaintiff's motion for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISION:

Federal:

Amendment 4: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly-describing the place to be searched, and the persons or things to be seized.

Amendment 14: §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

State:

Article I, Section 1: §1. Inalienable Rights. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

Article I, Section 10: §10. Detention of Witnesses; Inprisonment for Debt. Witnesses may not be unrasonably detained. A person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine.

STATUTORY PROVISIONS:

Federal:

42 U.S.C. 1983: Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1985(2): Obstructing justice; intimidating party, witness, or juror. (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict,, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons to the equal protection of the laws;

State:

California Civil Code Section 5118: [Earnings and accumulations constituting separate property: Income of spouse and children

living separate from other spouse.] The earnin and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while separate and apart from the other spouse, are the separate property of the spouse

California Code of Civil Procedures:

Section 572 (b): A temporary restrainin order may be granted with or without notice to restrain any person upon affidavit which, to th satisfaction of a court, shows reasonable proof of a past act or acts of actual violence resu ing in physical injury for the purpose of preventing a recurrence of actual domestic violence and assuring a period of separation of the pa involved. A temporary restraining order may be granted pursuant to this subdivision to any person who, prior to or at the time such orde is granted, was actually residing with the pers or persons at whom such order is directed, and, in the case of a marital relationship, notwithstanding that a petition for legal separation annulment or dissolution of marriage has not be filed.

A temporary restraining order granted pursuant to this subdivision shall remain in effect, in the discretion of the court, not t exceed 30 days, unless otherwise terminated by the court.

In case a temporary restraining order is granted without notice, the matter shall be made returnable on an order requiring cause to be shown why the order should not be dissolved, o the earliest day that the business of the court will permit, but not later than 15 days or, if good cause appears to the court, 20 days from th date the temporary restraining order is granted.

Any willful disobedience of any temporary restraining order granted pursuant to this subdivision shall be a misdemeanor.

The county clerk shall transmit a copy of each temporary restraining order, or extension,

modification or termination thereof, granted pursuant to this subdivision, by the close of the business day on which such order was granted, to the local law enforcement agency with jurisdiction over the residence of the party which obtained the restraining order or the residence at which the recurrence of actual domestic violence is the subject of the temporary restraining order, if requested by an attorney of record or a person who acted in propria persons and approved by the court. Each appropriate law enforcement agency may make available, through an existing system for verification, information as to the existence and current status of any temporary restraining order issued pursuant to this subdivision to any law enforcement officer responding to the scene of reported domestic violence.

Section 1209(5): [Acts or omissions constituting contempt] The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

...5. Disobedience of any lawful judgment, Order, or process of the court.

Section 1209(9): [Acts or omission constituting contempt] The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

...9. Disobedience of a subpena duly served, or refusing to be sworn or answer as a witness.

Section 2031(a)(1): [Discovery and production of documents and things for inspection, copying, or photographing: Service of notices, etc.] (a) Any party may serve on any other party a request (1) to produce and permit the inspection and copying or photographing, by or on behalf of the party making the request of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which are relevant to the subject matter of the action, or are reasonably calculated

to discover admissible evidence relating to any matters within the scope of the examination permitted by subdivision (b) of Section 2016 of this Code and which are in the possession, custody or control of theparty upon whom the request is served.

Section 2034(b)(1): The court may punish as a contempt (i) the refusal of any person to obey a subpoena issued by that court to attend a deposition or to be sworn as a witness, or (ii) the refusal of any person to attend a session of court (either personally or by his attorney) after having been directed to attend in the manner provided in subdivision (a) of this section, or (iii) the refusal of any person to obey any order made by the court under subdivision (a) of this section.

[Upon the refusal or failure of a party to permit inspection or entry after having been served with a request under Section 2031 of this code, the party serving such request may on like notice and upon a showing of good cause make application for an order to compel compliance with the request.]

STATEMENT OF THE CASE

The Plaintiff's complaints arise from a California dissolution action, but nevertheless raise questions of Federal significance by facts set forth as follows:

Certain financial documents belongin to Plaintiff were in the family home. On August 9, 1978, an ex parte temporary restraining order was issued by the Honorable Warren K. Taylor, presiding judge of Yolo Superior Court, wherein the dissolution action had been filed. The order was made returnable to the court and set for hearing sometime thereafter. However, by that time and in the court ordered absence of Plaintif from his home (providing no opportunity for him to remove any of his personal or private papers or belongings), Plaintiff's home had been "thoroughly searched" (in the words of Defendant' attorney at deposition in the dissolution action)

---

[1]Notwithstanding the fact that the requisite showing of actual physical violence was not and could not be factually alleged, Plaintiff does not challenge the propriety of the issuance of the temporary order, but rather raises only the issue of whether or not the issuance of such an order coupled with criminal charges for the disobedience of said order (California Code of Civil Procedure 527) constitutes "state action"/

for the purposes of finding, seizing and withholding from Plaintiff specific financial records, including the following:

a. five (5) years of Federal income tax records from years prior to marriage (1958-1962) in the sole name of James M. Giovanazi;

b. bank statements and passbooks of accounts established peior to marriage (1954) either in the name of James M. Giovanazi (solely) or jointly with Bernice M. Giovanazi (his mother);

c. records of United States savings bonds purchased monthly both prior to marriage (1954-1963) and after marriage (1963) each held in the joint names of James M. Giovanazi and Bernice M. Giovanazi;

d. bank statements for a military and separate account established exclusively by earnings of James M. Giovanazi during a lengthy separation of the parties in 1967 through 1968 and held solely in the name of James M. Giovanazi;

e. Plaintiff's military records.

Subsequent to this seizure, Defendant Ruth C. Giovanazi's attorney sought and was issued two (2) subpoenas duces tecum concerning these and other records. These

Claiming authority pursuant to the subpoenas, Defendant Ruth C. Giovanazi and her attorneys continued to withhold Plaintiff's financial records. Some of his records were locked in the safe of the counsel for Defendant Ruth C. Giovanazi's attorney. Others were retained in the office of Defendant Ruth C. Giovanazi's attorney or in the home of Defendant Ruth C. Giovanazi's attorney. Regardless of their whereabouts or Plaintiffs attempts to resecure his records, the undisputed fact remains -- Plaintiff never saw the records again throughout the dissolution proceedings. In the absence of the financial records, Plaintiff sustained substantial financial losses in the dissolution action.

After the conclusion of the dissolution action, Plaintiff's income tax records (as referred to previously in (a) were transferred from the safe of an attorney who represented Defendant Ruth C. Giovanazi's attorney to Traveler's Insurance Company, with whom Plaintiff

has never had business dealings or professional connection in any manner. Such transfer was without Plaintiff's knowledge or consent.

In December 1979, subsequent to the dissolution becoming final and under questioning by Yolo Superior Court, the Honorable Harry A. Ackley, presiding, the attorneys for Defendant Ruth C. Giovanazi retreated from their position that they had no further financial records belonging to Plaintiff and were thereupon ordered to deposit such documents with the court for inspection by Plaintiff.

On January 3, 1980, in compliance with that Order, counsels surrendered handfuls of financial records of Plaintiff's thus assisting Plaintiff to establish his now mooted claims.

On January 16, 1980, Plaintiff filed claims in the United States District Court for the Eastern District of California, pursuant to Title 42 U.S.C. 1983 and 1985(2), to recover damages sustained by the conduct herein alleged.

The District Court has jurisdiction to entertain this complaint purusant to Title 28 U.S.C. 1343

REASONS FOR GRANTING THE WRIT:

The questions raised are substantial and Plaintiff respectfully requests that this Writ be granted on the following grounds:

(1)THE DECISION BELOW CONFLICTS WITH STARE DECISI OF THIS COURT AND WITH THE STATUTORY LANGUAGE OF TITLE 42 USC 1983.

This Court has historically and emphatically held that in applying the "color of state law" requirement embodied in Title 42 USC 1983, the "relevant inquiry focuses not upon whose law is being implemented, but rather on whether the authority of the state was exerted in enforcing the law," Tongol v. Usery, 601 F2d 1091 (9th Cir., 1979); Shelley v. Kramer, 334 U.S. 1 (1948); United States v. Classic, 313 U.S. 299 (1941); Green v. Dumke, 480 F2d 624, 628-629 (9th Cir., 1973); Civil Rights Cases, 109 U.S. 3 (1883); Bivens v. Six Unnamed Agents 403 U.S. 388 (1971).

This Court, in Shelley v. Kramer, supra, designed the following criteria to determine

whether or not conduct constituted "state action" (in seeking to enforce a restrictive covenant in housing by resort to state court action, this court stated):

> "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint", at page 19 (emphasis added).

Thus, this court, in Shelley v. Kramer, supra, established a two prong test. First a showing of an active intervention of the state courts is required; second a showing of state power to (potentially) enforce the intervention is required to establish "state action" within the meaning of Title 42 U.S.C. 1983.

1. There was active intervention by the Yolo Superior Court:

On August 9, 1978, the Yolo Superior Court, by the hand of the Honorable Warren K. Taylor, presiding, issued a temporary order depriving Plaintiff of his fundamental right to occupy his own home and to be safe in his own private papers and financial documents

from "governmental intrusion" of ANY kind, (Civil Rights Act of 1866, 14 Stat. 27, Section 1; United States Constitution, Fourth Amendment; Shelly v. Kramer, supra; Bivens v. Six Unnamed Agents, supra; Wolf v. People of Colorado, 338 U.S. 25, 27; Camara v. Municipal Court 387 U.S. 523, 530 (1967) [extending the right of reasonable expectation of privacy to non-criminal searchs/seizures]; Wyman v. James, 400 U.S. 309 (1971) [citing Camara v. Municipal Court]. ABSENT THE ORDER OF YOLO SUPERIOR COURT, Plaintiff would have been free to occupy his home and possess his personal/private papers.

Moreover, by entertaining the matter on an ex parte basis, Plaintiff was deprived of any opportunity to be heard prior to issuing of said order in violation of Plaintiff's fundamental right to an opportunity to be heard before being deprived of property or fundamental rights, Sturges v. Crowshield, 17 U.S. (4 Wheat) 122 (1819); Matthews v. Eldridge, 424 U.S. 319; Snyder v. Massachusetts, 219 U.S. 97; Brinkerhoff-Faris Trust and Savings

Company, v. Hill, 281 U.S. 673, 680 (1930); Joint Anti Facist Committee v. McGrath, 341 U.S. 123, 168 (1951); Armstrong v. Manso, 380 U.S. 545 , 552 (1965); Grannis v. Ordean, 234 U.S. 385, 395 (1914).

Thus, there were two acts of intervention by state authority pursuant to the California Code of Civil Procedure Section 527, namely (a) the decision of the trial court to entertain the request for such an order without providing Plaintiff an opportunity to be heard, and (b) the decision of the court to issue such an order which deprived Plaintiff of certain fundamental civil rights guaranteed to him by the United States Constitution (Amendments Four and Fourteen) and the California State Constitution Article I Section 1.

2. Coercive state power was available to enforce the act of intervention:

The disobedience of the temporary restraining order by Plaintiff would have exposed Plaintiff to legal proceedings of a quasi-criminal nature, i.e. contempt, (California Code of Civil Procedure Section 1209 (5)).

The United States Supreme Court, in Bivens v. Six Unnamed Agents, supra, reiterated the long standing view of the high Court that where, by state action, a citizen is left no recourse to protect himself, as to invasions of his fundamental rights, but by resorting to criminal conduct, there is, IN FACT, state action, United States v. Lee, 106 U.S. 196, 219 (1889); in particular, this is a CLASSIC case of the type of action where a person is being COERCED BY USED OF STATE AUTHORITY, Shelley v. Kramer, supra.

In addition to the issuing of the temporary restraining order, the Yolo Superior Court took further action against Plaintiff by the issuing of two subpoenas duces tecum (California Code of Civil Procedure Section 2031).

1. the issuance of the subpoenas duces tecum constituted actions of intervention by the State:

Plaintiff and Defendant, Ruth C. Giovanazi, stood in an adverse posture at the time that the subpoenas were issued; the subpoenas compelled Plaintiff to surrender certain

records which would not have been available to Defendant except by order of the court. Therefore, the trial court intervened to force Plaintiff to forfeit a degree of privacy that he would have been entitled to maintain but for the order of the court.

2. coercive state power was available to enforce the act of intervention:

In the event that Plaintiff had failed to surrender certain documents for inspection, then Defendant had available to her certain state powers and sanctions against Plaintiff to compel his compliance with the COURT ORDERED SURRENDER OF PERSONAL AND PRIVATE AND FINANCIAL DOCUMENTS, (California Code of Civil Procedure Section 2034, specifying certain sanctions and penalties to be imposed upon Plaintiff should he not surrender the documents pursuant to the subpoenas duces tecum).

In the absence of any court orders, subpoenas duces tecum, Plaintiff would have continued to enjoy the privacy of his records and personal papers, California Constitution, Article I, Section 1.

Furthermore, with respect to private documents, it now becomes significant that Plaintiff was not in possession of the documents that were requested to be surrendered for inspection by the subpoenas. In fact, Defendant Ruth C. Giovanazi, while enjoying the exclusive possession and control of the family home and its contents, pursuant to the restraining order, had taken to her attorney the income tax returns of Plaintiff James M. Giovanazi for the years 1958 through 1962 (inclusive) notwithstanding that the parties were not married during these years and the tax returns were in the sole name of Plaintiff. Such returns are not subject to discovery pursuant to California Constitution Article I, Section 1 and California case law, in re Marriage of Brown (1979) 99 C.A. 3d 702; in re Marriage of Sammull, 103 C.A. 3d 557.

Therefore, Defendant Ruth C. Giovanazi not only acquired documents that she may have been entitled to have surrendered IN DISCOVERY by Plaintiff but she acquired documents that she would NOT have been permitted to have surrendered

by clever use of a temporary restraining order and subpoenas, all of which were issued as ENFORCABLE ORDERS OF THE YOLO SUPERIOR COURT.

Plaintiff respectfully contends that the trial court erred in dismissing his claim for failure to allege conduct constituting "state action".

In the first instances, the actual issuance of temporary orders and subpoenas, there is certainly state action. In the second instance, the use of the orders to further invade the privacy and security of the Plaintiff, such conduct was certainly taken "under the color of state" law.

As the lower court stated in Sykes v. State of California (Department of Motor Vehicles) (9th Cir., 1974) 497 F2 d 197,

> in order to show that defendant(s) were acting 'under color of state law' it is not necessary to allege that the action taken was authorized by the state; however, facts must be stated showing that the defendants were clothed with the authority of the State and were purporting to act thereunder, at page 200.

Plaintiff respectfully contends that the overextended use of the subpoena power consti-

tutes action taken "under the color of state law" for Plaintiff, by use of the subpoena duces tecum power, relied upon the representation of state authority and the threat of sanctions by state powers.

As this Court stated in Bivens v. Six Unnamed Agents, supra [regarding the entrance into a residence by thos purporting to have Federal authority]

> a private citizen, asserting no authority other than is own will not normally be liable in trespass if he demands, and is granted, admission to another's house... but one who demands admission under a claim of federal authority stands in a far different position, at page 394.

It is the USE of the state authority by ONE WHO MIGHT BE EXPECTED TO HAVE SUCH ACTUAL AUTHORITY that constitutes "under color of state law".

In dismissing Plaintiff's claim, the trial court relied upon this Syke v. State of California, supra, case and upon Phillips v. International Association of Bridge and Iron Workers, (9th Cir., 1977) 576 F.2d 939, at 940.

The trial court, the Honorable

PHILLIP C. WILKINS, presiding, stated as follows:

> (T)he Plaintiff has attempted to meet this (state law) requirement but has failed to do so as a matter of law. First, the Ninth Circuit Court of Appeal has clearly stated that the merefact that resort is had to a court in the course of a privately engineered deprivation of rights does not satisfy the state action requirement of Briley. I will cite you to Phillips against International Association of Bridge and Iron Workers, 576 Fed 2d 939, at 940, a Ninth Circuit case, 1977, (RT 6, 7).

Plaintiff respectfully contends that the Phillips case has no bearing on his case because in Phillips there was NEVER an order of any court that interferred with any rights of the plaintiffs nor was there any order that was used to interfere with plaintiff's rights.

The history of Phillips was simple. Plaintiffs had brought an action against the Union; whereupon the Union brought multiple and vexatious suits against the plaintiffs in various state courts and federal courts. The defense of these vexatious suits exhausted the plaintiffs' financial resources and, thus, they were unable to continue litigation as to their original suit. Plaintiffs then brought this

suit based upon the use by the defendants of the court system to deplete their financial resources. Regardless of the misuse of the judicial system, there simply was never any order of any court that prohibited the plaintiffs from proceeding with their original action nor was there any order of any court depriving them of any fundamental right(s). This is clearly distinguishable from Plaintiff James M. Giovanazi's case wherein he complains of court orders, both the restraining order and the subpoenas, as well as their misuse, depriving him of certain fundamental rights as set forth above.

Plaintiff James M. Giovanazi respectfully contends that his case is indistinguishable from Shelley v. Kramer, in that there were court orders by which he was bound and the state court stood prepared and available to Defendant Ruth C. Giovanazi to enforce those orders by jail terms or fines or other sanctions should Plaintiff not comply with said orders.

It was not the resort to the use of the state court of which Plaintiff complains; nor

was it the perhaps improvident issuing of the orders. Rather, it is exclusively the issuance of the orders and the coercive powers of the state court to enforce the orders of which Plaintiff relies to establish "state action" within the meaning of Title 42 U.S.C. 1983.

In each instance complained of by Plaintiff (the issuance of the ex parte restraining order, the issuance of subpoenas duces tecum and the use or misuse of each order as well as the orders themselves) BUT FOR the issuance of such orders, Plaintiff would have been entitled to enter, occupy, and enjoy his own home and to possess his financial records and private papers.

This Court, in Shelley v. Kramer, supra, has made it clear that the "but for" test is one means of testing for "state action" within the meaning of Title 42 U.S.C. 1983. Plaintiff respectfully contends his circumstances meet this test as well as the more precise two prong test previously discussed above.

A further test as set forth by this court in Leeke v. Timmerman, U.S. 70 L.Ed.2d 65 (1981), has reaffirmed the test set forth in Shelley v.

Kramer, supra; in Leeke, a South Carolina prisoner, complaining of abusive treatment, sought issuance of an arrest warrant from a magistrate, as he was entitled to do pursuant to South Carolina law. Prison officials intervened and pursuaded the magistrate not to issue issue the warrant. This court held that the prison officials had not interferred with the prisoner's right to seek the warrant; therefore, this court held that the prisoner could not establish state action pursuant to Title 42 U.S.C. 1983.

Here, in Plaintiff James M. Giovanazi's case, the decision by Yolo Superior Court to issue an order (depriving Plaintiff of fundamental rights) WITHOUT GIVING PLAINTIFF notice and opportunity to be heard not only INTERFERRED WITH Plaintiff's fundamental right(s), but totally unilaterally suspended such rights and placed Plaintiff as the mercy of the exercise of the full coercive powers of the state in the event that he challenged such orders, issued on an ex parte basis, prior to the date set for hearing on the matter substantially subsequent

to the issuance and the effective date of the order.

This court has consistently held that state action means that "the states have made available to such individuals the full coercive power of government," Shelley v. Kramer, supra, at page 19. In Plaintiff's case, the Yolo Superior Court was far more than a disinterested forum for litigation. When the court actively participates by making orders directed against Plaintiff, in OBVIOUS CONTRAVENTION of and with a flagrant disregard for such fundamental civil rights as have hereinbefore been set forth by Plaintiff, then, by the standards of this court in both Shelley v. Kramer, supra, and Biven v. Six Unnamed Agents, supra, Plaintiff has established the requisite element of state action sufficient to meet the criteria set for in Title 42 U.S.C. 1983 to state a claim upon which relief may be based.

(2) THE QUESTION OF WHETHER CLASS BASED INVIDEOUS DISCRIMINATORY ANIMUS IS REQUIRED TO STATE A CAUSE OF ACTION PURSUANT TO TITLE 42 U.S.C.1985(2) REMAINS UNADDRESSED BY THIS COURT AND COURTS BELOW FIND A "DEARTH" OF AUTHORITY TO INTERPRET THE CONGRESSIONAL INTENT.

The courts initially faced with this question reacted by asserting "...there is a dearth of authority construing 1985(2)," Hahn v. Sargant, 523 F2d 461, 469 (1st Cir., 1975); "... we approach the perfidious syntax of 1985(2) with some reserve, for as the First Circuit recently observed, there is a dearth of authority to light our way," Brawer v. Horowitz, 525 F2d 830, 837 (3rd Cir., 1976).

In determining that 42 U.S.C. 1985(2) was composed of two distinctive parts, the oourts took the equal protection language of the second part to be parallel with §1985(3), which requires class based discrimination, rather than to be parallel with the United States Constitution, Fourteenth Amendment.

This error in parallelism resulted in the courts concluding that while the first part of §1985(2) does NOT require class based discrimination, the second part DOES require such class based discrimination.

To split the requirements for §1985(2) is inconsistent with this Court's approach to statutory interpretation set forth in Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790 (1971) [also pertaining to §1985] and with this Court's holding therein that the "language is, of course, similar to that of Section 1 of the Fourteenth Amendment," at page 345, which guarantees INDIVIDUAL protection, and does not depend upon membership in any class, United States v. Harris, 106 U.S. 629, 643; Civil Rights Act of 1871, 17 Stat. 13 §2.

Membership in a class has never been required to secure rights guaranteed by the Fourteenth Amendment.

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights, Shelley v. Kramer, supra, 22.

3. FEDERAL COURTS OF APPEAL ARE AT VARIANCE WITH EACH OTHER AND LACK ANY OBJECTIVE OR BASIC GUIDELINES TO DETERMINE WHETHER OR NOT MEMBERSHIP IN A PARTICULAR CLASS IS LEGALLY SUFFICIENT TO STATE A CAUSE OF ACTION PURSUANT TO TITLE 42 U.S.C. 1985(2).

To determine what constitutes a sufficient class to qualify for protections and remedies prescribed by Title 42 U.S.C. 1985(2), legislative history, by debate records, indicate that church affiliation and even state of residency would be sufficient, Brawer v. Horwitz, 525 F2d 830 (3rd Cir., 1976). Furthermore, a single political opponent [Means v. Wilson, 522 F2d 833 (8th Cir., 1975)] or a single middle class Caucasian family [Azur v. Conley, 456 F2d 1382 (6th Cir., 1972)] or the political supporters of a particular candidate [Cameron v. Brock, 473 F2d 608 (6th Cir., 1973)] constitute sufficient classes within the meaning of §1985(2).

In the abstract, the only common denominator to these classes is the fact that

the members of the classsshared one common characteristic and that because of this common characteristic these persons became vulnerable to conduct designed to deprive them of certain basis civil rights.

Plaintiff is a member of the class of (retired) military persons and he respectfully contends that this is a proper class based upon the fact that the United States Court of Appeals, Ninth Circuit, has already either deemed or treated retired military persons as a class, Costello V. United States, 587 F.2d 424, (9th Cir., 1978), cert. denied 442 U.S. 929 (1979), or upon the fact that the class of military persons is actually discriminated against as to warrant recognition as a protectable class.

Plaintiff bases his contention of de facto invideous discriminatory animus because military members and only military members have been excepted from general legal principles, certain Constitutional (State) provisions and statutory laws of California in the following cases

(a)Fithian, in re Marriage of, 10 C.3d 592 (1974), cert. denied 419 U.S. 829 (1974); In re Marriage of Milhan, 27 C.3d 765 (1980), [holding future earnings of military retired persons to be retirement rather than earnings notwithstanding state decisi of this Court (United States v. Tyler, 105 U.S. 243 (1881); Fleming v. Nestor, 363 U.S. 608; Title 37 U.S.C. 701(a).)].

(b) California Civil Code Section 5118; Gorman v. Gorman, 90 C.A. 3d 454 (1979); in re Marriage of Fithian, supra; in re Marriage Milhan, supra [holding that earnings, mischaracterized by the California courts as retirement, are divisible as community property upon dissolution of marriage rather than awarding as separate property as required by California Civil Code Section 5118].

(c) Henn v. Henn, 26 C.3d 323 (1980), [permitting a non-military former wife to RE litigate her claimed interest in her husband's retired pay (in a new and subsequent action) some four years after final judgment had been entered

to the contrary in the original dissolution action].

(d) California Constitution Article I Section 10; in re marriage of Giovanazi (1981) Yolo Superior Court #38227 (presently on appeal) [holding that failure to pay a debt to the former wife (of his retired pay) can be punished by contempt and by imprisonment until so paid].

More significantly, and what makes the matter one of DE FACTO discrimination, when military members seek the benefits of the California courts abrogation of legal principles, stare decisi and California statutory and Constitutional law, such benefit is denied.

Not only is there a lack of mutuality but the decisions cited above are targeted solely upon military persons; no other class of persons or individual persons EXCEPT those members of the class of military persons are required to pay over to a former spouse any portion of his present earnings as COMMUNITY PROPERTY nor is another permitted to ignore judgments which have become

final on the same issues over four years prior to the new case being filed. There is no other class which has been treated in a similar, although inequitable fashion; therefore, Plaintiff respectfully submits that the class of military persons constitutes a class which has suffered DE FACTO discrimination and is entitled to recognition as a class entitled to protections which have been grossly abused by the State of California and the judicial system of this State. Under these conditions and circumstances a finding that the class of military persons is a sufficient class for purposes of stating a cause of action pursuant to 42 U.S.C. 1985(2) is proper and required.

Alternatively, the District Court found that Plaintiff was a member of the class of adverse parties:

> any acts committed by defendants were committed because plaintiff was or is an adversary in a legal action, (RT 8).

Plaintiff respectfully contends that the class of adverse parties is a sufficient class. Just as the political opponent had

certain protected rights to insure a fair campaign, and the supporters of another candidate had certain rights and the family had the right to be free from police harrassment (supra, p. 22), so too did Plaintiff have certain rights as an adverse party; such rights were established by the California Code of Civil Procedure, particularly pertaining to discovery and procedures in civil cases, the United States Constitution, Fourth, Fifth and Fourteenth Amendments (supra, p. 11).

For the foregoing reasons, Plaintiff respectfully requests that this Court grant this petition in order to provide uniform application in the resolution of the issue of what is a sufficient class for the purposes of stating a cause of action pursuant to Title 42 U.S.C. 1985(2).

(4) IS PLAINTIFF'S RIGHT TO DUE PROCESS VIOLATED BY THE DISMISSAL OF HIS COMPLAINTS?

The right to amend is liberally granted pursuant to the Federal Rules of Civil Procedure Rule 15. Further, the motion for leave to amend should be granted where denial may foreclose Plaintiff JAMES from proceeding on the merits, PSG Company v. Merrill, Lynch, Peirce, Fenner &

Smith, Inc., 417 F2d 659 (9th Cir., 1969).

Since any defects in the pleadings were curable, by amending the complaint Plaintiff JAMES should have been permitted to amend, Sanders v. Veterans Administration, 450 F2d 955 (9th Cir., 1974).

> An action should not be dismissed if there is any possibility that a claim can be stated. Sanders v. Veterans Administration, supra

The trial court itself admits that Plaintiff is a member of the class of adverse parties and leaves open the question as to whether or not this would be a sufficient class. The trial court certainly indicates that the actions of which Plaintiff complains were taken against him because of his membership in the class of adverse parties (RT 8). The conduct certainly violates the rights of a person involved in civil litigation. And as the court in Breckenridge so states:

> Indeed, the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not, p. 1799.

To deny Plaintiff opportunity to amend when, by the very words of the trail court, amendment is feasible is to deny Plaintiff his right to be heard on the merits and to deny Plaintiff due process. Brinkerhoff-Faris Trust v. Hill, supra; Armstrong v. Manso, supra; Anderson National Bank v. Luckett, 321 U.S. 233 (1944).

CONCLUSION

For the foregoing reasons the Court is requested to reverse the decisions of the Court of Appeals and to direct that court to issue an Order allwing Plaintiff to proceed in his actions against said defendants, and each of them.

Dated: May 26, 1982

Respectfully submitted,

JAMES M. GIOVANAZI
In propria persona
by LORETTA H. HELLEN
Attorney at Law

APPENDIX

1. ORDER OF THE UNITED STATES DISTRICT OURT, FOR THE EASTERN DISTRICT OF CALIFORNIA.

ORDER

The Motions to Dismiss Counts II and III of Plaintiff James M. Giovanazi's Complaint advanced by Defendants, Travelers Insurance Company and Ruth C. Giovanazi, came on regularly for hearing on August 25, 1980, in Department 2, in the United States District Court House before the Honorable Philip C. Wilkins, Chief Judge. Appearing for Plaintiff James M. Giovanazi, was his attorney, Loretta H. Hellen; on behalf of Defendant, Travelers Insurance Company, its attorney Chris W. Burford, III; and for Defendant Ruth C. Giovanazi, her attorney, John A. Young.

Count II of Plaintiff's Complaint attempts to frame a cause of action under 42 U.S.C §1983. That statute, however, requires allegations that defendants were acting under color of state law at the time of the acts complained of, Briley v. State of California, 564 F2d 849, 855 (9th Cir. 1977). Plaintiff has attempted to meet this requirement, but has failed to do so as a matter of law. First, the Ninth Circuit Court of Appeals has clearly stated that the mere fact that resort is had to a court in the course of a privately engineered deprivation of rights does not satisfy the state action requirement of Briley. Phillips v. Int. Ass'n. of Bridge S & O. Iron Wkrs., 556 F2d 939, 940 (9th Cir., 1977). Plaintiff also suggests that characterizing the private attorneys involved in the alleged deprivation of rights as "officers of the Court" provides a sufficient basis from which to infer state action. Briley v. California, cited above, clearly refutes this as a sufficient argument. The court will, therefore dismiss Count II of Plaintiff's complaint as it fails to state a claim for which relief may be

granted. Fed.R.Civ.P. 12(b)(6).

Count III of Plaintiff's complaint attempts to frame a cause of action under 42 U.S.C. §1985(2). Contrary to plaintiff's pleadings in resistance to the motions to dismiss, the Ninth Circuit has interpreted Section 1985(2) to require an allegation of a class-based, invidiously discriminatory animus in order to state a claim. Phillips, supra, at 942. See also Arnold v. Tiffany, 487 F2d 216, 217 (9th Cir.) cert. denied, 415 U.S. 984 (1973). Plaintiff claims that he has been discriminated against as a member of a class of retired military personnel. This Court declines to find the state class to be one to which the term "invidious discrimination" can be applied, for to do so would, in effect, convert Section 1985 into a general federal tort law. Such an action would be directly contrary to the intent attributed to Congress by the United States Supreme Court in Griffin v. Breckinridge, 91 S.Ct. 1790, 1798 (1971). Additionally, Plaintiff has not, and arguably cannot, allege that defendants intentionally and purposefully discriminated against plaintiff because he was a member of the stated class. See Blevins v. Ford, 572 F2d 1336 (9th Cir. 1978). Any acts committed by defendants were committed because plaintiff was or is an adversary in a legal action -- not because he is a retired member of the armed forces. The Court will, and must, therefore, dismiss Count III of plaintiff's complaint for failure to state a claim for which relief may be granted. Fed.R.Civ.P. 12(b)(6).

Plaintiff has prayed this Court's leave to amend his complaint. Having reviewed the proposed amendment submitted by plaintiff, the Court will deny his motion. To allow the proposed amendment would be fruitless as the gounds relied upon to dismiss Counts II and III of the present complaint would apply equally to a motion to dismiss those counts in the proposed amendment.

This Order renders moot the many other motions pending on the Court's calendar. Addi-

tionally, Count I of the Complaint appears to be directed only to the State of California. Since there has been no proper service on the Attorney General, the Court takes no position on the merits of this Count.

Finally, the Court would characterize Plaintiff's complaint as it relates to defendants Ruth Giovanazi and Traveler's Insurance Company as subject to the language of the district court in Shakespeare v. Wilson, 40 F.R.D. 500, 504 (S.D. Cal. 1966):

> ...on scrutiny it is often revealed that a plaintiff is trying to use the Civil Rights Act as a way of 'appealing' a state court-judgment, or... is trying to raise solely state law claims...

IT IS THEREFORE ORDERED that Counts II and III of plaintiff's complaint be, and hereby are DISMISSED.

DATED: September 2, 1980

/s/PHILIP C. WILKINS
UNITED STATE DISTRICT JUDGE

2. MEMORANDUM OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appeal from the United States District Court for the Eastern District of California
Hon. Philip C. Wilkins, District Judge, Presiding

Submitted: January 20, 1982

Before: DUNIWAY, WRIGHT and POOLE, Circuit Judges

The members of the panel have unanimously agreed that this case is appropriate for submission without argument. It is so ordered.

Appellant appeals from the district court's dismissal of his complaint for failure to state a claim under 42 U.S.C. §§ 1983 and 1985(2). Upon completion of divorce proceedings in state court, appellant brought this action against his ex-wife and Travelers, which had insured appellant's attorneys in the divorce action, alleging that they had deprived him of his constitutional rights and conspired to hinder his participation in the judicial process.

Appellant's §1983 claim was based on his allegation that, during the divorce proceedings, his ex-wife's attorney procured both a temporary restraining order preventing him from entering his home and a subpoena duces tecum to obtain his financial records. The district court correctly held that the use of a private attorney and resort to state court procedures does not constitute action under color of state law. Briley v. California, 564 F2d 849, 855 (9th Cir. 1977); Phillips v.International Association of Bridge Structural and Ornamental Iron Workers Local 118, 556 F2d 939, 941 (9th Cir. 1977).

Appellant's §1985(2) claim was based on his allegation that, because he is a retired military officer, his ex-wife, her attorney and his attorney conspired to prevent him from obtaining access to his financial records, thereby hindering his use of the legal system and depriving him of his property and of equal protection of the laws. In order to state a claim under the second part of §1985(2) appellant must show "some racial or perhaps otherwise class-based invidiously discriminatory animus behind the cinspirators' action." Griffin v. Breckenridge 403 U.S. 88, 103 (1971); Arnold v. Tiffany, 487 F2d 216, 218 (9th Cir. 1973). We agree with the district court that the class of retired military officers is not one to which the term "invidious discrimination" can be applied.

Finally, we hold that the district court did not abuse its discretion in denying appellant leave to amend his complaint. The district court reviewed appellant's proposed amendment and found it to be basically a restatement of the first complaint and thus subject to the same infirmities. Moreover, we can conceive of no amendment that would cure the defects in appellant's claims.

AFFIRMED.

3. ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: DUNIWAY, WRIGHT and POOLE, Circuit Judges.

The plaintiff-appellant's Petition for Rehearing has been considered and is denied